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No.

Supreme Court, U.S.
FILED
MAY 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES CRAWFORD MCAFEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals properly applied the Speedy Trial Act's pretrial motion exclusion, 18 U.S.C. 3161(h)(1)(F), in refusing to exclude the entire period between the filing of pretrial motions and the hearing on those motions in calculating time limits under the Act.

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OPINIONS BELOW

The opinion of the court of appeals reversing the judgment of conviction and ordering dismissal of the indictment (App., *infra,* 1a-6a) is reported at 780 F.2d 143. The initial opinion of the court of appeals (App., *infra,* 12a-43a) is reported at 751 F.2d 419. The opinion of the district court on remand from the court of appeals (App., *infra,* 7a-11a) is reported at 607 F.Supp. 105.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 44a) was entered on December 20, 1985. A petition for rehearing was denied on February 27, 1986 (App., *infra*, 45a). On April 21, 1986, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act of 1974 provides in pertinent part (18 U.S.C. 3161(h)):

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * * * *
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

STATEMENT

Respondents pleaded guilty to conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 955a(b) and 955c, and possession of marijuana with intent to import it into the United States, in violation of 21 U.S.C. 955a(d)(1). They were sentenced to concurrent terms of four years' imprisonment on each count, to be followed by two years' special parole; each respondent also was fined $5,000. The court of appeals reversed the convictions and ordered that the indictment be dismissed without prejudice (App., *infra,* 1a-6a).

1. Respondents were indicted on August 31, 1982, and charged with operating a vessel that carried more than 1,000 pounds of marijuana. Between September 10 and September 22, 1982, respondents filed 39 pretrial motions, including motions to dismiss the indictment and to suppress the evidence against them. On September 27, 1982, the government filed a response to all of the defense mo-

tions except the motions to dismiss and to suppress. A hearing on the motions to which the government had responded was conducted that same day, and on October 8, 1982, a magistrate ruled on 24 of the pending motions. The remaining 15 motions were reserved for resolution by the district court judge, and a hearing was scheduled on those motions for October 25, 1982. App., *infra*, 29a.[1]

Respondents subsequently filed three consecutive motions to continue the hearing date, each of which was granted in turn (App., *infra*, 29a). The last of these motions asserted that defense counsel had a number of scheduling conflicts, that the completion of discovery had been unavoidably delayed, and that a hearing on the pending motions could not be conducted until discovery had been completed. In that motion for a continuance, respondents represented that "all defendants in the above-captioned matter waive their rights to a speedy trial." Respondents accordingly requested a postponement of the hearing on their pending pretrial motions to January 10, 1983, or to a date after February 17, 1983. App., *infra*, 36a; 1 C.A. App. 127-137.[2] In response, the district court tentatively scheduled the hearing on respondents' pretrial motions for January 10, 1983, but noted that in the interim the case would be reassigned to a different judge who would have to confirm the date (App., *infra*, 35a; 1 C.A. App. 7-8).

While the case was in fact reassigned to Chief Judge Caffrey, the scheduled January 10 hearing on respondents' pretrial motions was not held (App., *infra* 29a; 2 C.A.

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[1] The motions reserved for the court fell into four categories: motions to suppress, motions to dismiss, motions for evidentiary hearings, and motions relating to the trial (App., *infra*, 29a).

[2] "1 C.A. App." refers to the appendix filed in the court of appeals on direct appeal from respondents' convictions. "2 C.A. App." refers to the appendix filed in the court of appeals on the subsequent appeal after a remand to the district court.

App.) 125.[3] Instead, the next development in the case occurred on March 11, 1983, when the government filed its response to the 15 outstanding defense motions. On May 23, 1983, respondents filed a supplemental memorandum in support of a renewed motion to suppress. Also on that date, a status conference was held before Chief Judge Caffrey, who stated that he had become aware only a few days earlier that the case had been assigned to him (App., *infra,* 4a, 30a; 2 C.A. App. 74-75). Defense counsel then explained that they were not yet prepared, in any event, for a hearing on their motion to suppress because they were attempting to obtain classified information regarding the Coast Guard's tracking procedures (*id.* at 75-77). When the prosecutor requested that the court schedule a date for hearings on the case-dispositive motions, defense counsel suggested that July 12, 1983, was the earliest convenient date (*id.* at 78). The court refused to postpone the hearing for such a lengthy period, however, scheduling it instead for June 14, 1983 (*id.* at 81).

2. On June 9, 1983, notwithstanding his prior waiver, respondent Pringle filed a motion to dismiss the indictment, alleging a violation of the Speedy Trial Act of 1974, Tit. I, 18 U.S.C. 3161 *et seq.* (App., *infra,* 40a; 1 C.A. App. 138-144). He contended in that motion that the time between January 10, 1983, and May 23, 1983, should be counted toward the Act's 70-day indictment-to-trial limit (see 18 U.S.C. 3161(c)(1); *Henderson* v. *United States,* No. 84-1744 (May 19, 1986), slip op. 5), even though pretrial motions were pending during that period. The district court denied the motion, finding the period in dispute to be excludable under Section 3161(h)(1)(F),

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[3] It appears that no formal order or continuance was entered postponing the hearing from the January 10, 1983, date (see App., *infra,* 20a-30a).

which removes from the 70-day speedy trial calculation "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the hearing on, or other prompt disposition of, such motion." See App., *infra,* 33a.

Over the next several months, the parties continued to litigate the question whether the government had a duty to disclose classified information relating to Coast Guard surveillance on the high seas (see App., *infra,* 30a-31a). The June 14 hearing date that originally had been set aside to address the suppression motion accordingly was devoted to debate on the availability of the classified information (see *id.* at 30a; 1 C.A. App. 145-160). The discovery issue finally was resolved in the government's favor on October 13, 1983.[4] The district court conducted a suppression hearing the following week, on October 21, 1983. On that same day, respondents again moved to dismiss the indictment on statutory speedy trial grounds. App., *infra,* 31a; 1 C.A. App. 358-359. This second speedy trial motion, as well as the other pending motions to dismiss and suppress, were denied by the district court on November 15, 1983 (App., *infra,* 31a). On December 5, 1983, respondents entered conditional guilty pleas, reserving their right to raise on appeal the denial of their speedy trial motions.[5]

3. When presented with the speedy trial question, the court of appeals acknowledged that respondents' pretrial motions had been pending, without a hearing having been held, from September 1982 through October 1983. The court of appeals nevertheless concluded that the district

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[4] In the interim, on October 8, 1983, the district court held a hearing on and denied two of the motions that had been pending since September 1982—a motion for individual voir dire and a motion to dismiss the indictment because of an alleged underrepresentation of women among grand jury foremen (see App., *infra,* 31a).

[5] Respondents also reserved the right to challenge on appeal the denial of their suppression and discovery motions. These challenges were rejected by the court of appeals. App., *infra,* 13a-26a.

court erred in excluding that period under Section 3161(h)(1)(F). App., *infra,* 33a. Instead, the court of appeals, relying on its prior decision in *United States* v. *Mitchell*, 723 F.20 1040 (1st Cir. 1983), read Section 3161(h)(1)(F) to permit the exclusion only of "reasonably necessary delay between the filing of pretrial motions and a hearing on them" (App., *infra,* 33a). The court therefore "evaluate[d] th[e] yearlong delay under the 'reasonably necessary' standard, filling in, as much as possible, the reasons for this delay from the record" (*ibid.*).

In conducting this detailed evaluation, the court concluded that much of the delay was excludable, either because it was, in the court's view, "reasonably necessary" (App., *infra,* 33a, 40a-41a), or because it was properly covered by a continuance (*id.* at 33a-36a).[6] In all, the court held that, setting aside the four-month period between January 10, 1983, and May 23, 1983, only 62 of the permissible 70 days had elapsed prior to the date the respondents entered their guilty pleas. The court then turned to that four-month period, which ran from the tentative hearing date selected by the initial judge for hearings on the case-dispositive motions to the date of the status conference conducted by Chief Judge Caffrey. During that period, the court noted, respondents' purported waiver of their speedy trial rights was in effect. The court held, however, that the waiver was "inoperative," reasoning that the statutory policy of encouraging speedy trials requires the rejection of attempts by the defense to surrender speedy trial rights. App., *infra,* 37a. But the court also concluded that, when a defendant's attempted waiver contributes to or causes a delay in the pretrial proceedings,

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[6] The court also held that the new motion to compel disclosure that had been filed on May 23, 1983, created an additional period of excludable delay, and that a portion of the delay was excludable pursuant to 18 U.S.C. 3161(h)(1)(J) as time during which motions were under advisement (App., *infra,* 40a-41a).

that delay should be excluded from the speedy trial calculation; otherwise, the court explained, "defendants would have successfully worked both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal" (*ibid.*). Because the court of appeals found it impossible to determine from the record whether respondents' attempted waiver contributed to the delay in disposing of the pretrial motions,[7] it remanded the case to the district court "for a determination of the reason for the delay which occurred between January 10 and May 23, 1983" (*id.* at 40a).

4. On remand, the district court conducted a hearing to determine the cause of the four-month delay. After hearing testimony from the prosecutor and reviewing the affidavits of defense counsel, the court concluded that "the [respondents'] waiver was the substantial, predominant, and proximate cause of the leisurely pace at which the case proceeded." App., *infra,* 10a. The court "credit[ed] [the prosecutor's] statement that had it not been for the waiver, he would have pressed the Court for an earlier trial date and would have attempted to accelerate the pace of the litigation" (*ibid.*). The court also found that the prosecutor's reliance on the waiver was reasonable. The district court accordingly denied respondents' motion to dismiss the indictment on speedy trial grounds (*id.* at 11a).

On appeal from this ruling, the court of appeals reversed. Pointing to Chief Judge Caffrey's May 23, 1983, statement that he only recently had learned that the case

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[7] The court reasoned that the delay might have been caused by the government's resistance to respondents' request for classified information. In the court's view, "it took an inordinate amount of time for the government to reply to [respondents'] motions for discovery, suppression and dismissal" (App., *infra,* 39a); the court also suggested that the government delayed unnecessarily in seeking a protective order (*ibid.*).

had been assigned to him,[8] the court of appeals found that "[t]he primary cause of delay in this case was the administrative mixup which prevented the court from exercising proper control of the case, indeed from even knowing that the case was on its docket." App., *infra*, 5a. In these circumstances, the court held that "[a] breakdown in the administrative processing of a case cannot be excused because of a waiver-induced failure of the government to monitor the progress of the case" (*ibid.*). The January 10 to May 23 period, when added to the 62 days that the court of appeals previously had found to be nonexcludable, far exceeded the 70 days of pretrial delay permitted under the Act. The court of appeals therefore ordered the indictment dismissed.[9]

The court of appeals subsequently denied the government's motion to hold the case pending this Court's decision in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), which addressed the scope of 18 U.S.C. 3161(h)(1)(F); after the decision in *Henderson*, the court of appeals denied a renewed motion to reconsider the case in light of *Henderson*.

REASONS FOR GRANTING THE PETITION

The court of appeals' ruling cannot be reconciled with this Court's recent decision in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986). The Court in *Henderson* held that "Congress intended [Section 3161(h)(1)(F)] to exclude

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[8] The court of appeals stated that the transcript of the May 23, 1983, status conference had not previously been available (App., *infra*, 4a).

[9] The court noted, however, that respondents' waiver might have contributed to the delay, and it reasoned that respondents should not "benefit from the misrepresentations of their counsel by a dismissal with prejudice" (App., *infra*, 6a). The court accordingly ordered the indictment dismissed without prejudice (*ibid.*). See 18 U.S.C. 3162(a)(2).

from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.' " Slip op. 9. In reaching that conclusion, the Court specifically disapproved the reasoning of *United States* v. *Mitchell,* 723 F.2d 1040 (1st Cir. 1983), upon which the court of appeals relied in refusing to hold that the entire period between September 1982 and October 1983 was excludable. See *Henderson,* slip op. 9.

By focusing on the reasons for the delay in scheduling a hearing on respondents' motions, in an attempt to determine whether that delay was "reasonably necessary," the court of appeals accordingly engaged in an irrelevant and improper inquiry. The period between January 10, 1983, and May 23, 1983, which the court of appeals found crucial—indeed, the entire period from September 22, 1982, through October 21, 1983—fell between the filing of respondents' pretrial motions and the hearings on those motions. As the Court explained in *Henderson,* such a period of delay should be excluded from the 70-day Speedy Trial Act calculation " 'automatic[ally].' " Slip op. 6, quoting 746 F.2d 619, 622 (9th Cir. 1984).[10] The judgment of the court of appeals therefore should be vacated, and the case remanded to give that court an opportunity to recalculate the Speedy Trial Act computation according to the standards set out in *Henderson.*

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[10] The period between the filing of the pretrial motions in this case and the date that those motions were taken under advisement by the district court (September 10, 1982, through October 21, 1983), and thus the length of the pretrial motion exclusion, is virtually identical to the period at issue in *Henderson* (November 3, 1980, through December 15, 1981). See *Henderson*, slip op. 9-10.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Henderson* v. *United States*, No.84-1744 (May 19, 1986).

Respectfully submitted.

CHARLES FRIED
Solicitor General

MAY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1355

UNITED STATES, APPELLEE,

v.

JAMES CRAWFORD MCAFEE, LLOYD COWAN PARKER,
WILLIAM BULL PRINGLE, III, DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Andrew A. Caffrey, *U.S. District Judge*]

December 20, 1985

Before COFFIN, Chief Judge, and TIMBERS,* Senior Circuit Judge, BOWNES, Circuit Judge

BOWNES, *Circuit Judge*. We consider here an appeal of a decision of the district court arising out of our remand in *United States* v. *Pringle*, 751 F.2d 419 (1st Cir. 1984), in which we asked the district court to determine whether a four and one-half-month period of delay in criminal pretrial proceedings was excludable delay under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(F) (1982). The district court found the delay excludable and defendants have appealed.

For a complete and detailed description of all of the pretrial proceedings, we refer to our previous opinion, *Pringle*, 751 F.2d at 430-31. Focusing only on the period

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*Of the Second Circuit, sitting by designation.

of delay at issue here, January 10, 1983, to May 23, 1983, we summarize the essential facts. The delay was preceeded by a continuance which postponed the date set for a hearing on dispositive motions and/or trial from November 29, 1982, to January 10, 1983. In the application for the continuance, defense counsel stated that "all defendants in the above-captioned matter waive their rights to a speedy trial." Because the continuance coincided with the implementation of a plan of the District of Massachusetts to expedite the trials of both criminal and civil cases by reassignment of the cases, the district court made the rescheduling of the hearing/trial date for January 10, 1983, subject to the confirmation of the judge to whom the case would be reassigned. The January 10, 1983 hearing/trial date never materialized, however. No further action occurred in the case, other than the government's filing on March 11, 1983, of a memorandum in opposition to the defendant's motion to dismiss and suppress, until the new judge to whom the case had been assigned on December 15, 1982, held a status conference on May 23, 1983.

At the time of the remand, we speculated that two different scenarios might explain this long delay. One was that both the court and government relied upon the waiver by the defendants of their speedy trial rights and did not apply the requirements of the Act to this case. In our previous opinion, we held that while a waiver of this kind could not be permitted to suspend the operation of the Speedy Trial Act, we would not let waiver-induced delay count toward the seventy nonexcludable days required for dismissal of an indictment, 18 U.S.C. §§ 3161(c)(1), 3162(a)(2), because this was the first time this rule was announced. We reasoned that we should not allow defendants to lull "the court and the prosecution into a false sense of security only to turn around later and used the waiver-induced leisurely pace of the case as grounds for dismissal." *Pringle*, 751 F.2d at 434. Thus, we directed on

remand that if the delay was caused by the waiver, it should be treated as excludable.

There was, however, a second explanation for the delay, which would not result in its exclusion. A major discovery issue in the case at that time was whether the government would release classified information pertaining to how the defendants' yacht had been spotted and put under surveillance. While the government did not actually move for a protective order for the classified information requested by defendants until June of 1983, it had indicated to defendants that it would proceed under the Classified Information Procedures Act as early as January, 1983. Since the motion for suppression and dismissal may have rested upon this classified information, it appeared that the government's long delay in addressing this crucial issue might have been the cause of the delay. We stated in our previous opinion that if the government's procrastination was at the root of this delay, the court also would bear some responsibility for failing to move the case along. Thus, we concluded that "[i]f the delay between January 10, 1983, and May 23, 1983, was due to the government and the court, not the defendants' waiver, then the time is nonexcludable and the indictment must be dismissed." *Pringle*, 751 F.2d at 435.

Upon remand, the district court below held an evidentiary hearing to determine whether the defendants' waiver "caused or contributed to the delay." *Pringle*, 751 F.2d at 434. The district court found that the government attorney had in fact relied upon the defendants' waiver and had accordingly slowed down the pace of the case. The effect of the waiver was further strengthened by numerous conversations between the government and defense counsel in which defense counsel indicated their satisfaction with the slow pace of the case because they were all extremely busy and because they recognized that the case was a "loser" and that their clients faced "maximum exposure." The district court found that the "defendants' waiver was the

substantial, predominant, and proximate cause of the leisurely pace at which the case proceeded."

During the remand hearing, however, a third explanation for the period of delay surfaced. A transcript of the May 23, 1983, status conference which had not previously been available either to this court or the parties showed that the district court itself was unaware that the case had been reassigned to it until shortly before the status conference:

> THE COURT: Where has this case been since the 15th of December when I discovered to my horror this was allegedly withdrawn. I never saw or heard of this case until last Wednesday or Thursday.
>
> MR. ELDRIDGE: Is that right, sir?
>
> THE COURT: You better believe it. My regular courtroom deputy is in Paris at the moment so I can't interview her as to what, if anything, she knows or doesn't know. I never saw the names of any of these defendants. We get a computerized printout every week or couple times a week.
>
> MR. MONCIER: Judge Garrity had the case.
>
> THE COURT: Up until December 5th.
>
> MR. MONCIER: Then it went into what we understand was a pool and we were just informed that your Honor had been assigned the case out of the pool.
>
> THE COURT: Well, what they did is all the cases that the panel headed by Judge Garrity didn't dispose of were redrawn on one individual member of the Court and the computerized docket, which is this thick, recites it was drawn to me December 15th, but never got on any of my individual lists.

It thus appears that even though the government may have been relying upon the waiver to justify its slow movement on the case, the court itself was, due to a clerical or computer error, entirely unaware of the fact that the case was

on its docket and, therefore, could not have known of the waiver.

In holding that the delay in question was predominantly caused by the waiver, the district court focused upon the government's role of helping the court to stay within the limits of the Speedy Trial Act and reasoned that, "but for" the waiver, the government would have reminded the court of the Speedy Trial Act problems which were being created by the long delay. The difficulty we have with this analysis is that it fails to recognize that the court has its own independent responsibility to enforce the Act.

While the government's interest in avoiding the dismissal of indictments may motivate it to remind the court of possible Speedy Trial Act violations lurking ahead, the primary responsibility for meeting the Act's requirements rests on the court. The elimination of delays caused by court congestion and administrative red tape was a major, if not *the* major, concern of Congress in passing the Act. S. Rep. No. 1021, 93d Cong., 2d Sess. 22, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 160 (Fed. Judicial Center 1980). It is the court which must set the dates for hearings and trial and decide pretrial motions within the time limits specified by the Act. "Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself." *Pringle*, 751 F.2d at 429. A breakdown in the administrative processing of a case cannot be excused because of a waiver-induced failure of the government to monitor the progress of the case. It is the court's responsibility to see to it that the deadlines of the Act are met. The primary cause of the delay in this case was the administrative mixup which prevented the court from exercising proper control of the case, indeed from even knowing that the case was on its docket. We are sensitive to the fact that in this case the judge personally was fully aware of his responsibilities and acted promptly when he discovered the error. Our difficulty, however,

with attributing significance to possible error or inaction by the prosecutor or a court clerk is that such an analysis fails to recognize that the court has its own independent and undelegable responsibility to enforce the Act.

A delay of this kind is not excludable time under the Act. *United States* v. *Ferris*, 451 F.2d 436 (1st Cir. 1984). When this four and one-half-month delay is added to the sixty-two days of nonexcludable delay which occurred during other parts of the pretrial period, the total far exceeds the seventy days of pretrial delay allowed under the Act. Dismissal of the indictment is, therefore, mandated. 18 U.S.C. § 3162(a)(2).[1]. The facts and circumstances of this case lead us to conclude that the dismissal should be without prejudice. Defense counsel are not blameless here. Although the waiver was not the primary cause of delay, the government might have alerted the judge to the progress of the case had it not relied on the waiver. We do not think defendants should benefit from the misrepresentations of their counsel by a dismissal with prejudice.

Reversed. Dismissed without prejudice.

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[1] 18. U.S.C. § 3162(a)(2) provides in pertinent part:

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. . . . In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution of the administration of this chapter and on the administration of justice.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Crim. No. 82-249-C

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM BULL PRINGLE III, ET AL., DEFENDANTS

Mar. 22, 1985

CAFFREY, Chief Judge.

This case is before the court on remand from the Court of Appeals for the First Circuit. The defendants appealed their convictions for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to import it into the United States. The Court of Appeals vacated this Court's order denying defendant's motion to dismiss for violation of the Speedy Trial Act, 8 U.S.C. § 3161, and remanded the case for redetermination of that motion. *United States v. Pringle, et al.*, 751 F.2d 419 at 436 (1984). The Court of Appeals identified sixty-two nonexcludable days in the case exclusive of the period from January 10, 1983 to May 23, 1983 and directed this Court to examine whether any or all of that period was excludable. The Court of Appeals ruled that if any more than eight non-excludable days were found, the case must be dismissed for violation of the seventy day Speedy Trial Act limit.

The circumstances surrounding the delay of this trial are somewhat complex. In November 1982 the case was on the docket of a three-judge panel, chaired by Judge Garrity, but was scheduled for reassignment to a single judge in December of 1982. On November 17, 1982 the defendants

moved for a continuance of the hearing on dispositive motions then scheduled for November 29 and a continuance of the trial which was scheduled for December 6, 1982. In support of that motion for continuance, counsel for all three defendants filed affidavits reciting extensive commitments before other courts and tribunals as distant as Tennessee, Oregon, and Florida. These other matters in other courts included two capital cases, a disciplinary proceeding against a member of the bar of the State of Tennessee, a criminal case involving seven co-defendants and hearings before the Merit Systems Protection Board.

Defendant's motion to dismiss also contained the following statement: "6. . . . all defendants in the above-captioned matter waive their rights to a speedy trial."

Judge Garrity allowed the motion and tentatively rescheduled the trial for January 10, 1983 "subject to confirmation by judge to whom case is reassigned." There was, however, no hearing on any other proceeding on the case until May 23, 1983. During the interim, the matter was redrawn to the undersigned but did not come to the Court's attention until mid-May, at which time the May 23 status conference was promptly scheduled.

The Court of Appeals has made it clear that because of the public interest in speedy trials a defendant may not waive his interest in a speedy trial. Therefore, the purported waiver found in defense counsel's motion for continuance was ruled ineffective. *Id.* at 33. However, speaking for the Court of Appeals, Judge Bownes observed "[W]here a waiver creates delay, such delay will be excludable. [d]efense counsel, as officers of the Court have a responsibility to keep in mind the two-fold purpose of the Speedy Trial Act . . . [d]efense counsel may not simultaneously use the Act as a sword and shield. We think it unethical and dishonest for defense counsel to waive the Act in the trial court and then disclaim such waiver upon appeal." Judge Bownes also observed (at p. 31) "[I]t is not clear, however, whether the period of delay following the waiver should be considered nonexcludable.

This depends on whether or not the waiver caused or contributed to the delay."

Subsequent to the remand, an evidentiary hearing was held to resolve the question of whether or not the above-quoted waiver caused or contributed to the delay from January 10 to May 23, 1983.

At the hearing, the government called former Assistant United States Attorney John L. Doherty as a witness and affidavits were submitted by Attorney Doherty, who was trial counsel for the United States and by Attorneys Herbert S. Moncier, counsel for MacAfee and Attorney Robert W. Ritchie, counsel for defendant Parker. On the basis of the sworn testimony of Mr. Doherty, and having in mind the contents of the affidavits from other counsel, I find that the government did not "accelerate the pace" of the scheduling of this case nor did it press the defendants or the Court to agree on an earlier trial date because of Mr. Doherty's reliance on the representations, in the motion for continuance, to the effect that defendants (without limitations of any kind) waived their rights to a speedy trial. I find that this delay was further caused by Mr. Doherty's reliance on a number of conversations with defense counsel which Mr. Doherty had during the months following the filing of the waiver. For example, Attorney Ritchie described in detail to Mr. Doherty his extensive commitments to criminal trials in many other parts of the United States. Attorney Lawson, co-counsel for MacAfee, told Mr. Doherty that his law firm was extremely busy with major criminal trials scheduled in Miami and New Orleans and also that his firm was concerned with "more pressing matters." Mr. Doherty relied on the fact that Attorney Muse, counsel for Pringle, was not anxious to schedule trial because Mr. Muse told Mr. Doherty that he (Muse) was afraid that the redrawing of the case gave his client "maximum exposure" as a result, Mr. Muse made it clear that he was not in a hurry for Mr. Doherty to try and establish a trial date.

I believe Mr. Doherty's testimony that at no time during many conversations with counsel for all three defendants did any defense counsel state or hint to Mr. Doherty that any defense counsel or his client had any interest in the Speedy Trial Act or in a speedy trial. Quite to the contrary, counsel for all three defendants stated to Mr. Doherty that they were of the opinion that the case was a "loser and that the defendants, all of whom were enlarged on bail, were content with the situation." Mr. Doherty testified that he was of opinion that the delay was also caused by the pre-Mitchell opinion erroneously held by all counsel that all time during the pendency of a dispositive motion was excludable and Mr. Doherty also testified that problems related to the Classified Information Procedures Act was a minor factor in the delay.

On all the evidence, I find that the defendants' waiver was the substantial, predominant, and proximate cause of the leisurely pace at which the case proceeded and I find that this waiver coupled with the above-described conversations between Mr. Doherty and defense counsel caused and contributed to the delay.

I credit Mr. Doherty's statement that had it not been for the waiver, he would have pressed the Court for an earlier trial date and would have attempted to accelerate the pace of the litigation.

It should be noted that Mr. Doherty's affidavit establishes that no defendant pressed for a trial date or raised a Speedy Trial claim until June 9, 1983. Significantly, after Attorney Muse filed his speedy trial claim, Mr. Doherty was advised by Attorneys Lawson, Ritchie and Eldridge (an associate of Ritchie's) that they were unhappy because Muse had filed the motion stating to Mr. Doherty "we had an agreement." I rule that the statement in Mr. Ritchie's affidavit as to his unarticulated intent that the waiver by his client not be indefinite, has no probative value in the context of this case because the unarticulated

intention, even assuming it existed, would have no effect on the reasonableness of Mr. Doherty relying on the unqualified motion for a waiver which stated no time limit. On the basis of the foregoing, I find and rule that former Assistant United States Attorney John Doherty's reliance on the unqualified waiver was reasonable on his part in the light of his many conversations with defense counsel discussed above, and I find that the waiver was the major and proximate cause and a contributing factor to the delay. Accordingly, I rule that an order should enter denying the motions to dismiss for violation of the Speedy Trial Act in order to prevent defense counsel from simultaneously using the Act as a sword and shield by waiving the provisions of the Speedy Trial Act in this Court and then attempting to disclaim the waiver in the Court of Appeals. A hearing on the question of sanctions, referred to in page 38 of Judge Bownes' opinion, will be scheduled for 2:00 p.m. on April 22, 1985.

Order accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 84-1059 to 84-1061.

UNITED STATES OF AMERICA, APPELLEE,

v.

WILLIAM BULL PRINGLE, III, DEFENDANT, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

JAMES CRAWFORD MCAFEE, DEFENDANT, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

LLOYD COWAN PARKER, DEFENDANT, APPELLANT

Dec. 19, 1984

Before CAMPBELL, Chief Judge, BOWNES, Circuit Judge, and WEIGEL,* Senior District Judge.

BOWNES, Circuit Judge.

Defendants-appellant, William Bull Pringle, III, James Crawford McAfee, and Lloyd Cowan Parker, appeal their convictions of conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 955a(b) and 955c (count four) and of posessing marijuana with intent to import it into the United States in violation of

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* Of the Northern District of California, sitting by designation.

21 U.S.C. § 955a(d)(1) (count six).[1] There are four issues before us: (1) whether the stop, boarding, search and seizure of the sailing vessel Nirvana with a cargo of twelve tons of marijuana violated defendants' rights under statutory authority, the fourth amendment or international law; (2) whether the Classified Information Procedures Act was violated; (3) whether count four of the indictment should have been dismissed; and (4) whether the Speedy Trial Act was violated.

I. THE SEIZURE OF THE NIRVANA

On August 20, 1982, the Coast Guard Cutter Cape Higgon had been ordered to patrol an area northeast of Cape Cod. Its commanding officer, Lieutenant Jost, had been instructed to be on the lookout for a sailing vessel approximately forty to sixty feet in length, possibly flying a foreign flag. Jost was also told that there would be an aircraft in the area and if the aircraft sighted the vessel, he was to board it, that it was suspected of carrying marijuana.

After arriving in the designated patrol area, the cutter received a radio transmission from a Coast Guard helicopter stating that it had sighted a vessel matching the description of the one suspected of carrying marijuana. Based on the information received from the helicopter, the cutter located the Nirvana approximately twenty miles northeast of Thacher's Island, which lies off Cape Ann, Massachusetts.

The cutter followed the Nirvana and closed to about seventy-five yards. The name of the vessel was displayed on a board which was secured to the ship by two bolts, one

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[1] The defendants were charged in a six-count indictment. After some pretrial skirmishing, all counts except four and six were dismissed and defendants entered a conditional plea of guilty to these two counts pursuant to Federal Rule of Criminal Procedure 11(a)(2).

at either end of the name board. A similar board indicated that the Nirvana's home port was Dover. This method of attaching a nameplate to a vessel violated federal regulations which require that the name either be painted on the hull or each individual letter of the name be screwed into the hull. Using removable nameplates makes it easy to change a vessel's name.

The Nirvana was on a "very extreme starboard heel" and appeared to be "riding low in the water." Lieutenant Jost also noted that the Nirvana flew no flag.

The cutter displayed a stop sign on the bow, turned on its blue light, hoisted a pennant with the international signal to stop—"Lima"—and over the loud hailer ordered the Nirvana to "heave to and stand by to be boarded."

In the ensuing radio communication between the two ships, the Coast Guard was told that the Nirvana's home port was Dover, Delaware, that its last port of call was Falmouth, Maine, and that its destination was Marblehead, Massachusetts. Her announced destination was inconsistent with the course she had been following.

On the assumption that the Nirvana was a United States vessel, a boarding party was sent over under the authority of 14 U.S.C. § 89(a) with orders to perform the standard documentation and safety check and "to check the main compartment for bulk marijuana." On boarding the Nirvana, a Coast Guard officer announced that the action was taken pursuant to 14 U.S.C. § 89(a). The officer proceeded to the main cabin and requested the documentation papers. He was informed that there were none. As he looked around the cabin, the officer noticed numerous packages wrapped in black plastic and tied with twine tape; they appeared to be packages of marujuana. There was a strong smell of perfumed deodorant in the cabin. As the officer looked around further, he saw more black plastic packages and determined that they contained marijuana. He opened one of the packages, saw a green leafy

substance, and tested it for THC, the active marijuana ingredient. The test indicated that the substance was marijuana. The cutter was notified of the presence of marijuana on the Nirvana, the defendants were arrested, the vessel was seized, and more than twelve tons of marijuana was confiscated.

It was later ascertained that the Nirvana was registered in the Grand Cayman Islands.

Under these facts, our own precedent compels that the attacks on the boarding, search and seizure of the Nirvana be repelled.

A. *Fourth Amendment and Statutory Attacks*

Since the fourth amendment and statutory claims are closely related, we consider them together.

The first question is standing. The government urges that defendants have no standing because under *Rakas* v. *Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), they had no legitimate expectation of privacy in the area searched nor an interest in the property seized. It is true that defendants have asserted "that they played no part as owners of the boat or the marijuana, or as financiers, or managers of the importation scheme." App. Brief at 2. But they were the only ones aboard the Nirvana at the time of the seizure. They had charge of her day-to-day operations and she was their temporary home. In *United States* v. *Lochan,* 674 F.2d 960 (1st Cir. 1982), we analyzed *Rakas* in detail and the cases leading to it and flowing from it. We concluded that some of the factors relevant to a privacy expectation are "legitimate presence in the area searched, possession or ownership of the area searched or the property seized, prior use of the area searched or the property seized, ability to control or exclude other's use of the property, and a subjective expectation of privacy." *United States* v. *Lochan,* 674 F.2d at 965.

Both the defendants' claim that they were innocent dupes and the government's argument that they had no standing to assert a fourth amendment defense sink under the heavy weight of the facts. The defendants had a right of privacy in the Nirvana to the extent afforded any crew member of a small vessel on the high seas. We have held that this is a lesser expectation of privacy than people have in their homes and obviates the usual fourth amendment requirement of a search warrant. *United States* v. *Green*, 671 F.2d 46, 53 (1st Cir. 1982).

The statute under which the Coast Guard boarded the Nirvana, 14 U.S.C. § 89(a),[2] is no stranger to this circuit. In *United States* v. *Hilton*, 619 F.2d 127 (1st Cir. 1980), we held:

> Under this statute, the Coast Guard may stop and board any American flag vessel on the high seas without a warrant and without any particularized suspicion of wrongdoing. Although the statutory language is quite broad, the statute has been consistently construed as limiting such stops—in the absence of probable cause—to the necessary task of conducting safety and document inspections. A more extensive search is permissible only if there is consent or probable cause to believe a crime has been or is being committed. Upon probable cause, the Coast Guard is authorized to seize the vessel and its contents, and to arrest those aboard.

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[2] § 89. Law enforcement (a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrest upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine,

. . . .

> We believe the limited intrusion represented by a document and safety inspection on the high seas, even in the absence of a warrant or suspicion of wrongdoing, is reasonable under the fourth amendment.

ID. at 131 (footnote and citations omitted).

At the time the boarding took place, the Coast Guard had good grounds for believing that, despite the fact she was flying no flag, the Nirvana was an American vessel. The Crew was obviously American and had informed the commander of the cutter that the Nirvana's home port was Dover, Delaware. Once aboard the Nirvana, the Coast Guard had authority to conduct a reasonable safety and document inspection. Entering the main cabin for this purpose was entirely proper. The packages of marijuana were in plain view. Discovery of the marijuana justified the arrest of the defendants and seizure of the vessel under 14 U.S.C. § 89(a). *United States* v. *Hilton,* 619 F.2d at 133.

That the Nirvana was not an American vessel but of Grand Cayman registry only postpones the inevitable, it does not change it. In *United States* v. *Green,* 671 F.2d at 53, we held that, "in addition to permitting proper administrative searches, the fourth amendment allows gov-

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inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a find or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

ernment officers, who are otherwise authorized, to board and search a vessel on the high seas should they have reasonable and articulable grounds for suspecting that it is engaged in criminal activity." (Footnote omitted.) "This 'reasonable suspicion' standard . . . requires less than probable cause to justify a nonadministrative maritime search." *United States* v. *Marsh,* 747 F.2d 7 at 10 (1st Cir. 1984). We find that there was reasonable and articulable grounds here for suspecting that the Nirvana was engaged in criminal activity: she was flying no flag; she had an easily removable nameplate; and she appeared to be riding low in the water.[3] *See United States* v. *Marsh,* 747 F.2d at 10; *United States* v. *Green,* 671 F.2d at 53-54; *United States* v. *Arra,* 630 F.2d 836, 846 (1st Cir. 1980).

Defendant's "pretext" argument that the Coast Guard intended to stop and board the Nirvana prior to any indication of suspicious activity also founders on the shoals of our prior cases. In *United States* v. *Arra,* 630 F.2d at 845-46, we held that the motivation for a particular boarding is not relevant; the test is whether there was an objective basis for the boarding. *See also United States* v. *Hayes,* 653 F.2d 8, 12 (1st Cir. 1981); *United States* v. *Kincaid,* 712 F.2d 1, 4 (1st Cir. 1983). And as we noted in *Kincaid,* the Supreme Court has explicitly stated that an otherwise lawful document search does not become unlawful because the officer might have, in fact, been looking for drugs, not documents. *United States* v. *Villamont-Marquez,* 462 U.S. 579, 103 S.Ct. 2573, n.3 at 2577, 77 L.Ed.2d 22 (1983).

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[3] We have not factored into the grounds for suspecting criminal activity the fact that the Nirvana's announced destination was inconsistent with the course she had been following because this did not become known to the Coast Guard until after the order to stop for boarding was given.

B. *International Law*

The claim that the seizure of the Nirvana violated international law and requires the exclusion of the evidence seized is completely demolished by our decision in *United States* v. *Hensel,* 699 F.2d 18 (1st Cir. 1983). In *Hensel,* we assumed that the search violated international law and, therefore, was not authorized by 14 U.S.C. § 89(a). We held that the exclusionary rule should not be invoked because "[t]he rule of international law in the case at bar is a rule designed to secure peace among nations, not to protect the privacy of individuals." *Id.* at 30. The international law on which defendants rely is to promote and protect freedom of the seas for nations, not to protect smugglers. *Id.* The defendants, here, as in *Hensel,* simply had no standing to invoke the protection of international law.

No matter what tack they take, the defendants cannot escape the barrier reefs of our precedent.

II. THE CLASSIFIED INFORMATION PROCEDURES ACT

After indictment, the defendants moved for discovery pursuant to Federal Rule of Criminal Procedure 16 requesting the disclosure of information and the production of materials related in any conceivable way to the surveillance, boarding and seizure of the Nirvana. After a considerable lapse of time, the government moved, pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16, for an *in camera* hearing "concerning Coast Guard Intelligence matters and classified information now in the possession of the United States Coast Guard." The motion also asked that the court "prevent the release to the defense of classified information in this case." This motion was followed a month later by an application for an "*in camera* lodging of government's *ex parte* application for protective order." This re-

quest was made pursuant to Federal Rule of Criminal Procedure 16(d)(1)[4] and §§ 3 and 4 of CIPA.[5] Five weeks subsequent to the "lodging" application, the government filed an *in camera ex parte* submission consisting of the affidavits of the Secretary of Transportation, Chief of Operations of the United States Coast Guard, and a lieutenant in the Coast Guard, along with the documents sought to be protected.

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[4] Rule 16(d)(1) provides:

> (1) **Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

[5] Sections 3 and 4 provide:

> **§ 3. Protective orders**
>
> Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.
>
> **§ 4. Discovery of classified information by defendants**
>
> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the Information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Following the *in camera ex parte* submission the defendants filed notice of their intent to cause the disclosure of classified information under § 5(a) of CIPA.[6]

The defendants intended to question government witnesses at the hearing on the motion to suppress in regard to the surveillance of the Nirvana.

After further delay, the district court conducted an *ex parte in camera* inspection of the submitted material and concluded that the national security would be damaged if the information and materials sought were disclosed to the defendants or the public. It further found that the surveillance information was neither relevant nor helpful to the defense of the accused nor otherwise essential to a fair adjudication of the case and, hence, not discoverable under Federal Rule of Criminal Procedure 16. At the hear-

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[6] 18 U.S.C. App. § (a) provides:

(a) Notice by defendant

If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

ing on the motion to suppress, the district court sustained all the government's objections to questions concerning the surveillance of the Nirvana.

Defendants claim that the district court committed reversible error by failing to follow the procedures required by CIPA. They argue that because they gave notice under § 5(a) of the Act of their intent to disclose or cause to be disclosed classified information, the government had to proceed under § 6 of the Act. Section 6(a)[7] provides for an *in camera* but not an *ex parte* hearing. Defendants contend that since the government did not proceed under § 6 of the Act, the district court lacked authority to exclude classified information from pretrial discovery and the suppression hearing. They also contend that the government's failure to give notice under § 6(b) of the Act was fatal.[8]

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[7] 18 U.S.C. App. § 6(a) provides:

(a) Motion for hearing

Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

[8] 18 U.S.C. App. § 6(b) provides:

(b) Notice.

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified in-

Based upon their interpretation of CIPA, defendants conclude that their statutory and due process rights were violated.

Defendant's argument ignores the statutory history of the Act, misconstrues its application, and distorts its plain meaning. CIPA was enacted by Congress in 1980 to meet those situations in which a criminal defendant possesses classified information and threatens to disclose it during trial. Prior to CIPA, the government had no way of evaluating the gravity of the danger to national security should the prosecution continue and the information be disclosed. CIPA was enacted in response to what was perceived as "greymail" practiced upon the government. S. Rep. No. 823, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4297-98.

The purpose of CIPA is to enable the government to ascertain prior to trial the classified information which the defendant possesses so that it can evaluate the effect of its disclosure on national security. Sections 5 and 6 of the Act set out detailed procedures to that end. For an in-depth examination of those sections *see United States* v. *Collins,* 720 F.2d 1195 (11th Cir. 1983); *United States* v. *Wilson,* 721 F.2d 967 (4th Cir. 1983); *United States* v. *Wilson,* 732 F.2d 404 (5th Cir. 1984). It is clear, however, that §§ 5 and 6 do not apply to this case.

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formation at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

None of the defendants here possessed classified information which they threatened to disclose. Quite to the contrary, they were seeking classified information which the government sought to protect. The government properly invoked §§ 3 and 4 of the Act. Section 3 provides: "Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States," Under § 4, "[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure." The legislative history clearly establishes that these sections were intended to make explicit the protective orders allowed for limitation of discovery of classified information pursuant to Federal Rule of Criminal Procedure 16. S. Rep. No. 823, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4298-99.

Section 4 also provides for an *ex parte* examination by the court: "The court may permit the United States to make a request for such authorization in the form of the written statement *to be inspected by the court alone.*" (Emphasis added.)

We rule that the government correctly followed the pertinent sections of CIPA in this case and the court's *ex parte in camera* inspection of the documents was authorized under § 4 of CIPA and Federal Rule of Criminal Procedure 16(d)(1).

We also reject defendants' contention that the protective orders issued by the district court violated their due process rights. We have reviewed the classified information and agree with the district court that "it was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense and was not essential

to a fair determination of the cause." The information was, therefore, properly excluded. *Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); *Roviaro* v. *United States,* 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957).

III. COUNT FOUR OF THE INDICTMENT

Defendants contend that Count Four of the indictment should have been dismissed because it omitted an essential element of the offense charged. Count Four charges:

> On or about August 20, 1982, at a point approximately 22 miles East-Northeast of Gloucester, Massachusetts aboard the vesel "Nirvana" and elsewhere,
>
> JAMES CRAWFORD McAFEE,
> LLOYD COWAN PARKER
> and
> WILLIAM BULL PRINGLE, III
>
> each of them being citizens of the United States, did knowingly and intentionally combine, conspire, confederate and agree with each other and with divers persons presently unknown to the Grand Jury, to commit an offense against the United States, to wit, knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance; in violation of Title 21, United States Code, Sections 955a(b) and 955c.

21 U.S.C. § 955a provides in pertinent part:

> (a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

21U.S.C. § 955b is the definition section. 21 U.S.C. § 955c provides:

> Any person who attempts or conspires to commit any offense defined in sections 955a to 955d of this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

It is basic law that an indictment is sufficient if the offense is described with sufficient clarity to show a violation of law, and enables the accused to know the nature and cause of the accusation against him and to plead an acquittal or conviction in bar of future prosecution for the same offense. *Hamling* v. *United States,* 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L.Ed.2d 590 (1974).

United States v. *Fusaro,* 708 F.2d 17, 23 (1st Cir. 1983), *cert. denied,* ____U.S.____, 104 S. Ct. 524, 78 L.Ed.2d 708 (1984). "An indictment is generally sufficient if it sets forth the offense in the words of the statute including all the elements." *United States* v. *Holmes,* 632 F.2d 167, 169 (1st Cir. 1980) and the cases cited therein.

There is no merit to defendants' claim; the district court did not err in refusing to dismiss Court Four of the indictment.

IV. SPEEDY TRIAL ACT VIOLATIONS

Defendants also claim that the indictments should have been dismissed for violations of the Speedy Trial Act, 18 U.S.C. § 3161 et seq. Defendants were indicted on August 31, 1982, and their trial did not commence until December 5, 1983, 463 days later. On June 9, 1983, and October 21, 1983, defendants made motions to dismiss the indictments for violations of the Speedy Trial Act; both motions were summarily denied by the district court.

Some preliminary observations are in order. The Speedy Trial Act requires that a defendant be brought to trial within seventy days of either indictment or first appearance before a judicial officer, § 3161(c)(1), but it also permits the exclusion of delay periods caused by specified kinds of pretrial activity from the computation of this seventy-day period. § 3161(h). The Act can be seen to have a twofold purpose: furthering the interest of both criminal defendants and the public in a speedy trial. "Speedy trial may be of concern to the defendant, as he may want to preserve the means of proving his defense, to avoid a long period of pretrial imprisonment or conditional release, and to avoid a long period of anxiety and public suspicion arising out of the accusation. From the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses." *Standard Relating to Speedy Trial* § 1.1 commentary (1968). The Act controls the conduct of the parties and the court itself during criminal pretrial proceedings. Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself. The Act is as much aimed at the delay caused by judicial congestion and mismanagement as it is aimed at the deliberate stalling of counsel. 120 Cong. Rec. 41618 (1974) (statement of Sen. Ervin). The Act provides two specific sanctions for impermissible delay. Regardless of whether the seventy-day limit has been exceeded, counsel may be punished for dilatory tactics by the imposition of fines, temporary suspension of the right to practice before the court, or disciplinary reports. § 3162(b). In addition, upon the motion of the defendant, the indictment may be dismissed with or without prejudice if the seventy-day limit has been exceeded, either as a result of counsel's

dilatory tactics or delay caused by the court itself. § 3162(a)(2). It is the dismissal sanction which has emerged as the primary means for enforcing the Act because defendents' interest in the dismissal of indictments, preferably with prejudice, usually exceeds the interest of the courts or prosecutor in adhering to the strict timetables set up by the Act.

When a motion for dismissal is brought under the Speedy Trial Act, the district court must review the course of events from the indictment up to the filing of the motion to dismiss, tracking each motion and proceeding which occurred during that period and evaluating the resultant delay under the Act. For the most part, exclusion of periods of delay is not discretionary; the statute sets out quite specifically what can be excluded and what cannot be excluded. Certain delays, however, may be excluded at the discretion of the district court, as in the granting of a continuance[9] or the exclusion of "reasonably necessary" pretrial motion delay.[10]

Appellate review of motions to dismiss under the Speedy Trial Act is shaped by the largely mechanical nature of the statute itself. We must start from scratch in the computation of excludable and non-excludable time under the Act. Where we are dealing with exclusions which are not discretionary, failure to properly exclude delay or improper exclusion of delay is error as a matter of law. Where the exercise of judicial discretion is authorized, our review of the excludability of such time is guided by the "abuse of discretion" standard.

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[9] Delay resulting from a continuance may only be excluded "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." § 3161(h)(8)(A).

[10] In *United States* v. *Mitchell*, 723 F.2d 1040 (1s Cir. 1983), we held that delay resulting from pretrial motions would only be excludable under § 3161(h)(1)(F) if it were "reasonably necessary" and that such a finding was to be made by the district court before excluding any extended period of time. *Id.* at 1047.

Our review here of the district court's denials of defendants' motion to dismiss for Speedy Trial Act violations involves the tracking of some sixty-three motions filed by the three defendants. Before getting bogged down in the detail which is necessarily entailed, it is appropriate to provide an annotated summary of the major events in this 463-day chronology. After the indictment on August 31, 1982, one motion was filed September 10, 1982, thirty-six motions were filed on September 20, 1982, and two motions were filed on September 22, 1982. The government filed a consolidated response to all motions except those to dismiss and suppress on September 27, 1982. As a result of a hearing before a magistrate on September 27, 1982, twenty-four of the motions were decided by order of the magistrate on October 8, 1982. For our purposes, we need only note that this included the grant of discovery to the defendants. Fifteen motions were reserved for the district court judge and a hearing was set for October 25, 1982, The motions reserved for the district court fell into four major categories: motions to suppress, motions to dismiss, motions for evidentiary hearings and motions directly relating to the trial, such as voir dire. Defendants then asked for and obtained three continuances postponing the date of the hearing on the motions. The reasons given for these continuances were schedule conflicts for the defense attorneys and delays in the discovery process. The third continuance ran into a problem because it resulted in scheduling the hearing and trial later than December 15, 1982, after which time the case was to be reassigned to another judge under a plan of the district of Massachusetts to speed up the trial of both criminal and civil cases. With this in mind, the trial judge reset the trial date to January 10, 1983, subject to confirmation by the reassigned judge.

According to the record we have before us, no hearing or trial did in fact occur on January 10, 1983, and there is no record of a formal order or continuance allowing fur-

ther postponement of the hearing and trial. The government finally submitted its memorandum in opposition to the motions to suppress and dismiss on March 11, 1983. On that same date, a new United States Attorney was added to the case. On May 23, 1983, a status hearing on the case was held and a hearing on the still undecided motions was set for June 14, 1983. Also on May 23, 1983, one of the defendants filed a motion to compel disclosure of the surveillance methods used to locate the Nirvana, claiming that the government was dragging its feet on discovery. On June 9, 1983, the first of the two motions to dismiss for speedy trial violations was filed. it was denied without written opinion on June 15, 1983.

In the meantime, on June 10, 1983, the government filed a motion for an *in camera ex parte* hearing on an application for a protective order for the surveillance material. On June 13, 1983, the day before the long awaited motion hearing, the court held a pretrial conference to consider the question of the *in camera ex parte* hearing. The United States Attorney indicated that he had told defense counsel "months and months ago" that he would be requesting such a hearing to protect classified surveillance information. At this point, a controversy erupted over what was required under CIPA. The hearing on the pretrial motions to dismiss and suppress was indefinitely postponed since both sides agreed that much of the substance of the motions to suppress and dismiss would depend on the disclosure of the surveillance information.

A second status conference was held on July 6, 1983. The government insisted that a letter from the Attorney General was not necessary under CIPA, as defendants claimed, and did not produce it. The court then stated that if the letter was not produced by July 13, 1983, it would seriously entertain the motions to suppress. The court nonetheless accepted the government's submission of a

memo justifying its *in camera ex parte* application without the certification of the Attorney General. On July 13, 1983, the government filed a motion for a continuance of the hearing on the *in camera ex parte* application until August 3, 1983. The court granted the continuance and set a hearing on the application for August 15, 1983.

At the August 15 hearing, the government persisted in its interpretation of CIPA, which we have found was correct, and submitted to the court the secret materials it wished to have protected. Defendants objected to this submission and moved to dismiss. The court adjourned the hearing after indicating that it would take both motions under advisement.

On October 8, 1983, a hearing was held on two of the fifteen motions which had been filed September 20, 1982, and were still undecided. One was a motion for individual voir dire and the other was a motion to dismiss because of systematic underrepresentation of women as grand jury forepersons. Both were denied the day of the hearing.

The discovery issue was resolved on October 13, 1983, when the district court issued an order denying discovery to the defendants on the surveillance techniques. This paved the way for a hearing on the motions to suppress and dismiss, which took place on October 21, 1983. On that same date, the second motion to dismiss for violations of the Speedy Trial Act was filed. This was denied on November 15, 1983, as part of an order deciding the balance of the motions to dismiss and suppress. On December 5, 1983, two additional motions were filed and denied and the trial began.

We now consider how much of the 463-day pretrial period was excludable under § 3161(h). The seventy-day period begins to run when the defendant first appears before a judicial officer or when the indictment is filed, whichever occurs later. § 3161(c)(1). In this case, the defendants first appeared before a magistrate on August

23, 1982, but were not indicted until August 31, 1982. Thus we begin our computation of the seventy-day period on August 31, 1982. The day of the indictment, however, is excludable under § 3161(h)(1) as a "proceeding concerning the defendant." *United States* v. *Brown,* 736 F.2d 807, 808 (1st Cir. 1984). Similarly, September 2, 1982, is excludable since on that day defendants were arraigned and a bail hearing took place. On September 10, defendants filed a motion which was heard by the magistrate on September 27. Under § 3161(h)(1)(F), "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on . . . such motion" shall be excluded. In *United States* v. *Mitchell,* 723 F.2d 1040 (1st Cir. 1983), we held that (F) permitted "only such delay as is reasonably necessary from the time of filing a pretrial motion to the time of concluding a hearing on it . . . ." *Id.* at 1047. This seventeen-day delay is certainly within the bounds contemplated by *Mitchell.* Overlapping with this exclusion are two additional exclusions, running from September 20-27 and September 22-27, attributable to the motions filed on September 20 and 22 which were also heard on September 27. Also excludable was the period from September 27 through October 8, 1982, which covers the period during which the motions heard on the 27th were "under advisement" until the magistrate issued an order on October 8. § 3161(h)(1)(J). We note that the district court correctly excluded both the pretrial motion period from September 10 through September 27 and the under advisement period from September 27 through October 8.

As of October 8, fifteen motions were still pending because the magistrate had reserved them for the trial judge. At that point, a hearing had been set for October 25, 1982. In fact, as has been described above, these motions were not heard until October 21, 1983. This yearlong period of delay is the heart of defendants' motion to

dismiss. The district court ordered this entire period excluded under (F). Since that time, however, we have made it clear that (F) only permits reasonably necessary delay between the filing of pretrial motions and a hearing on them. *Mitchell,* 723 F.2d at 1047. *Mitchell* also requires district courts to "make specific and reasonably contemporaneous statements of the reasons for any extended exclusions of time between filing and hearing . . . of pretrial motions." *Id.* This is necessary if we are to be able to conduct an effective appellate review of these exclusions. Clearly, however, the requirement of a statement of reasons was prospective only and since this order of excludable delay was made two months prior to our holding in *Mitchell,* we cannot hold the district court at fault for failing to provide us with the reasons for this delay. Nonetheless, as in *Mitchell,* we must evaluate this yearlong delay under the "reasonably necessary" standard, filling in, as much as possible, the reasons for this delay from the record before us.

We begin by noting that originally the hearing on pending motions was scheduled for October 25, 1982. Had the hearing in fact taken place at that time, we do not believe the seventeen-day delay from the magistrate's order to the hearing would have been unreasonable. Consequently, we think it appropriate to exclude the period from October 8 to October 25. Overlapping with this period is an exclusion from October 20-22, reflecting the filing and granting of the first motion for a continuance. The continuance of the hearing granted by the court ran from October 25 through November 15, the new hearing date. As long as the district court did not abuse its discretion in granting such a continuance, we must allow this period to be excluded. § 3161(h)(8)(A). The standard for the exclusion of delay resulting from the grant of a continuance is that the judge find that "the ends of justice served by taking such action outweigh the best interests of the public and the defendant

in a speedy trial. *Id.* "[T]o insure careful consideration of the relevant factors by the trial court and to provide a reviewable record on appeal," we held in *United States* v. *Rush,* 738 F.2d 497, 507 (1st Cir. 1984), that reasons for such a finding should be stated in the record. None of the three continuances granted during this period are accompanied by any statement of reasons. We also held in *Rush,* however, that "it is not necessary for the court to articulate the basic facts when they are obvious and set forth in a motion for a continuance." *Id.* We find that the reasons set forth in the motion for the continuance—defense counsel scheduling conflicts and unavoidable discovery delays—sufficiently supplement the continuance order to allow meaningful review.

The legislative history of the Speedy Trial Act Amendments Act of 1979 indicates that scheduling conflicts of either defense or government counsel were intended by Congress to be legitimate ground for granting a continuance under § 3161(h)(8). The Amendments Act inserted into the list of factors to be considered by the court, "[w]hether the failure to grant such a continuance . . . would unreasonably deny the defendant or the Government continuity of counsel . . . ." § 3161(h)(8)(B)(iv). The Senate Committee Report on this amendment indicated that this was designed to "meet the concern over scheduling conflicts caused by defense counsel's and the United States Attorneys' good faith, already scheduled commitments . . . which would otherwise require a disruptive change of counsel, in order to meet the time limits." S. Rep. No. 212, 96th Cong., 1st Sess. 34-35, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 185 (Fed. Judicial Center 1980). We therefore find that the continuance was properly granted and the period from October 25 to November 15 was excludable.

Overlapping with this period is the exclusion due to the filing and granting of the motion for the second continuance, November 1-2, 1982, The second continuance postponed the hearing from November 15 to November 29, 1982. It was requested for the same reasons as the previous continuance and also was properly granted. Consequently, the period from November 15 through November 29 was excludable. Looking at the district court's orders of excludable delay, we find that in response to a government request for an order of excludable delay resulting from the grant of the two continuances, the district court erroneously ordered that the period from October 20 to October 29 be excluded. This order appears to have resulted from a misreading of the government's motion requesting the court to "exclude the period of delay resulting from the defendants' motions for continuance filed on October 20 and October 29, 1982 . . ."[11] to mean a request to exclude the period from October 20 through 29. What may properly be excluded, in addition to the actual continuance periods, was the time consumed by the filing and consideration of the continuance motions, as we have already indicated.

The third motion for a continuance was made on November 16 and was granted November 17, 1982, along with a motion to allow a defendant to travel outside the jurisdiction. These two days are therefore excludable under (F). In granting a continuance of the trial date until January 10, 1983, the district court judge noted that since the case would be assigned to a new judge before then, the trial date was subject to the confirmation of the new judge. The government has argued that this, in essence, created an open-ended continuance of the kind permitted in *Rush,* 738 F.2d at 508, extending the continuance to whatever time the new judge set for the motion hearing. If

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[11] The district court's records indicate that the second continuance motion was filed on November 1, not October 29.

we were to accept this theory, it would mean that this continuance extended until June 14, 1983, which was the date initially set for the hearing by the new judge.[12] In *Rush* we indicated that "[i]t may well be that some sort of reasonableness limitation is appropriate to prevent continuance from delaying trials unfairly and circumventing the dismissal sanctions in the Speedy Trial Act," *id.*, but we stopped short of making this a holding. Nor need we here. This was not an openended continuance. A specific closing date was chosen so that the new judge would be forced to turn his or her attention to the case fairly quickly or run the risk of incurring nonexcludable delay. That it did not so work out is no reason to believe it was not intended to do so. We therefore limit the period of excludable delay due to this third continuance to the forty-two-day period between November 29, 1982, and January 10, 1983.

The third motion for a continuance contained the statement that "all defendants in the above-captioned matter waive their rights to a speedy trial." The goverment asserts that this waiver should operate to exclude the period from November 16, 1982, when the motion was filed, to June 9, 1983, when a motion to dismiss for violation of the Speedy Trial Act served to revoke the waiver, citing our recent decision in *Rush,* 738 F.2d at 509. Our finding in *Rush,* however, that the waiver produced excludable delay was permised upon a concession by appellants that the waiver would have such an effect. Here, defendants argue that under the Act a defendant may waive only the right to dismissal, and that may be waived only by failing to move for dismissal under the Act prior to trial. § 3162(a)(2). They argue that this waiver provision should not be read

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[12] The June 14, 1983 hearing date was not met due to the extended controversy about the discoverability of the surveillance material. In fact, the hearing did not actually take place until October 21, 1983.

to allow a defendant to suspend the operation of the statute altogether. Defendant's position is well supported by the legislative history. The 1979 Senate Committee Report stated:

> The Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal . . ., is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

S.Rep. No. 212, 96th Cong., 1st Sess. 28-29, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 182 (Fed. Judicial Center 1980). While it may often be in the defendant's interest to delay the trial, Congress has determined that such a delay is not in the public interest. Thus, even where such a waiver is offered, as was the case here, the statute imposes upon the court the obligation to reject it.

It is clear that if there was a waiver in this case, it was inoperative. It is not clear, however, whether the period of delay following the waiver should be considered nonexcludable. This depends on whether or not the waiver caused or contributed to the delay.

We first consider the possibility that the waiver caused the delay. If we were to find that the delay caused by the waiver did not stop the speedy trial clock, then we would be rewarding the defendants by enhancing their chances of dismissal. In essence, defendants would have successfully worked both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal. The sanction of dismissal was intended by Congress to serve as a deterrent

for the failure of the United States Attorney or the court to comply with the Act. S.Rep. No. 1021, 93rd Cong., 2d Sess. 42, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 208 (Fed. Judicial Center 1980). In such cases, the interest of both the defendant and the public in a speedy trial combine to outweigh the interest of the public in the prosecution of criminals. Where it is the conduct of the defendant or defense counsel which creates the delay, it is only the public's interest in a speedy trial which has been violated. Using the sanction of dismissal for such delay would be counterproductive because, even though it might keep the courts and the prosecution more on their toes, the possibility of dismissal would serve as a powerful incentive for defendants and defense counsel to create delay. Congress sought to prevent this by providing direct sanctions against attorneys who engage in dilatory tactics. The Act provides for sanctions against an attorney who "makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of the continuance." § 3162(b)(3). Such attorney may have his or her fee reduced by 25%, be fined up to $250, be denied the right to practice before the court for up to ninety days, or be reported to a disciplinary committee. § 3162(b). Direct attorney sanctions are particularly appropriate against offending defense attorneys since they further the public's interest in a speedy trial without sacrificing its interest in the prosecution of criminals.

Under the Act a waiver ought not to be allowed by the district court and has no effect on a defendant's right to dismissal. Nevertheless, we hold that where a waiver creates delay such delay will be excludable. Defense counsel, as officers of the court, have a responsibility to keep in mind the twofold purpose of the Speedy Trial Act: the interest of the defendant in a speedy trial and the interest of the public in a speedy trial. To the extent the Act

protects the defendant's interest, it places limits primarily on the actions of prosecutors and courts; to the extent that the Act protects the public's interest in a speedy trial, it places limits on the actions of defense counsel as well. Defense counsel may not simultaneously use the Act as a sword and a shield. We think it unethical and dishonest for defense counsel to waive the Act in the trial court and then disclaim such waiver upon appeal.

It is also quite possible that the delay from January 10, the reassigned trial date, to May 23, 1983, when the defendants filed a motion to compel disclosure and the court held a status hearing, had nothing to do with the waiver. The delay may well have been rooted in the defendants' attempt to obtain classified information from the government. Although we have upheld the government's position as to this information, we must point out that it took an inordinate amount of time for the government to reply to defendants' motions for discovery, suppression and dismissal filed on September 20, 1982. The government did not file a response to the motions to dismiss and suppress until March 11, 1983, and did not begin applying for a protective order on the surveillance material until June 10, 1983. The court also bears some responsibility for allowing this hiatus of inaction to continue. If the delay between January 10, 1983, and May 23, 1983, was due to the government and the court, not the defendants' waiver, then the time is nonexcludable and the indictment must be dismissed.

Our problem is that we cannot tell which of these two scenarios is an accurate description of the reasons for this delay. It was precisely for this reason that we ordered district courts to provide a statement of reasons for the exclusion of long periods of time under (F). *Mitchell*, 723 F.2d at 1047. Since *Mitchell* did not come out until December 29, 1983, we cannot fault the district court for not stating reasons for excluding the period from

September 20, 1982, through October 21, 1983, the date the motions hearing finally took place. We find, however, that it is impossible to complete our review without the firsthand analysis that only the trial judge can provide. We thereby think it appropriate to remand this case to the district court for a determination of the reason for the delay which occurred between January 10 and May 23, 1983, and a finding as to whether this time is excludable or not. *See United States* v. *Brown,* 736 F.2d 807 (1st Cir. 1984).

Rather than stop at this point, we feel it appropriate to complete the computation of the excludable time from May 23 to the date of the trial, December 5, 1983, to correct errors in the district court's analysis and so the parties will know exactly where they stand.

Independent of any exclusion due to the continuing pendency of the September 20, 1982 motions, the beginning of a new excludable period was marked by the filing of a motion to compel disclosure on May 23, 1983. This motion was finally heard on August 15, 1983. Under the rule of *Mitchell,* we must consider whether this delay was reasonably necessary and we find that it was since, as already recounted, June and July were taken up by the wrangling about the proper procedure for the court to use in determining whether the surveillance information was discoverable or not. In addition, the government obtained a continuance of the July 13 hearing. Thus, the period from May 23 to August 15 is excludable under (F). Overlapping with this exclusion is an exclusion also under (F) for the first motion for dismissal for speedy trial violations, filed June 9 and denied June 15, 1983. Two similar overlapping exclusions resulted from the government's motion for an *ex parte in camera* hearing on the Coast Guard intelligence matters, filed June 10 and heard along with the motion to compel disclosure on August 15, and defendants' motion for time to file a response to the

government request for an *ex parte in camera* hearing, filed June 21 and granted June 22. The excludable delay was further extended for one day to include August 16 since defendants filed another motion to dismiss on July 14 which was denied on August 16.

On October 13, 1983, the court issued its decision on the motion to compel disclosure and the application for a protective order. In its later order of excludable delay, it included the entire period from August 15 through October 13, a period of fifty-nine days. Congress has limited the period of excludable delay attributable to pretrial motions "under advisement" to thirty days. § 3161(h)(1)(J). Consequently, only the period from August 15 to September 14 may be excluded.

On October 8, 1983, a hearing was held on two of the motions which had been pending from September 20, 1982: a motion for individual voir dire and a motion to dismiss because of claimed underrepresentation of women as grand jury forepersons. Both motions were denied summarily on the day of the hearing. The district court excluded the entire period from September 20, 1982, to October 8, 1983, even though it is clear that the government's response to these motions was complete on September 27, 1982, and neither motion was particularly weighty, as evidenced by the district court's quick disposal of them on October 8. Consequently, we do not believe this delay can be considered "reasonably necessary." It is clear that the resolution of these motions was delayed because they were caught up with the motions to suppress and dismiss. There are no independent grounds for justifiying the delay in hearing and resolving these two motions.

A hearing on the remaining motions of September 20, 1982, was finally held on October 21, 1983. Much of our determination of whether this delay was reasonably necessary will depend upon the district court's findings of the reason for the delay from January 10 to May 23, 1983.

Beyond that, we note that September 14, 1983, marked the date when the discovery problems should have been resolved. Consequently, we cannot find the delay created by scheduling the hearing on October 21 either reasonable or necessary. As a result, for the period from September 15 through October 21, only October 8 and October 21 may be excluded. Following the October 21 hearing, the district court issued a decision on the remaining motions. Since the date of the decision, November 15, was less than thirty days from the hearing, the entire under advisement period of twenty-five days may be excluded.

The trial began on December 5, 1983. Not counting the period from January 10 to May 23, 1983, we find a total of sixty-two nonexcludable days:

September 1, 1982	1 day
September 3-9, 1982	7 days
September 15-October 7, 1983	23 days
October 9-20, 1983	12 days
November 16-December 4, 1983	19 days
Total	62 days

We remand this case to the district court to determine whether all or any of the period from January 10, 1983, to May 23, 1983, should be excluded. If the district court finds eight or more nonexcludable days, the seventy-day limit of the act will have been exceeded. In such an event, we direct the district court to enter an order granting defendants' motion to dismiss under the Speedy Trial Act, dismissing the indictments, either with or without prejudice, as the court believes appropriate under § 3162(a)(2) of the Speedy Trial Act. If, on the other hand, the court finds there were less than eight nonexcludable days, it shall enter an order so finding, and it shall deny defendants' motion to dismiss for violation of the Speedy Trial Act. If the court adopts this latter course, it may also impose such sanctions, if any, upon the defense attorneys as it deems appropriate.

The court's prior denial of the defendants' motion to dismiss for violations of the Speedy Trial Act is vacated, and the case is remanded for redetermination of that motion pursuant to our instructions herein.

Subject to the district court's further ruling upon the motion to dismiss as above provided, the judgments of conviction are in all other respects affirmed.

SO ORDERED.

APPENDIX D

U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Criminal No. 85-249-1-3

Order on Excludable Delay

UNITED STATES OF AMERICA

v.

MCAFEE, ET AL

In accordance with the Speedy Trial Act of 1974 (as amended) this Court hereby ORDERS excludable delay as follows:

3161(h)(1)(F) Pretrial Motions from filing date 9/20/82 to hearing or other prompt disposition date 10/21/83. 397 days.

October 28, 1983
Date

/s/ Andrew A. Caffrey
United States District Judge
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 82-00249-C

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAMES CRAWFORD MCAFEE,
LLOYD COWAN PARKER,
WILLIAM BULL PRINGLE, III,
DEFENDANTS.

ORDER

November 15, 1983

CAFFREY, Ch. J.

This matter came before the Court on defendants' motion to dismiss all counts of the indictment and to suppress certain evidence. After hearing, I rule that the motion to dismiss should be allowed only as to counts 2 and 3, each of which failed to allege an essential element of the offense charged; namely an intent on the part of defendants to distribute a controlled substance in the United States. Counts 2 and 3 merely allege that defendants conspired to "possess with intent to distribute a quantity of marijuana in excess of 1,000 pounds" and make no reference as to where the distribution was to occur. *See, United States* v. *Hayes,* 653 F.2d 8, 15 (1st Cir. 1981).

I further rule that there is no merit in defendants' motion to dismiss as to the other counts of the indictment. After hearing evidence in connection with the motion to suppress the evidence, I find and rule that the government has shown that the evidence in question was legally obtained and that there is no legal basis for ordering it suppressed. Accordingly, it is ORDERED:

1. Defendants' motion to dismiss is hereby allowed as to counts 2 and 3 of the indictment.

2. Defendants' motion to dismiss is hereby denied as to counts 1, 4, 5, and 6 of the indictment.

3. The motion to suppress the evidence is denied.

s/s Andrew A. Caffrey

ANDREW A. CAFFREY, CH. J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1355

UNITED STATES, APPELLEE,

v.

JAMES CRAWFORD MCAFEE,
LLOYD COWAN PARKER,
WILLIAM BULL PRINGLE, III,
DEFENDANTS, APPELLANTS

JUDGMENT

Entered: December 20, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The order of the district court denying the motions to dismiss for violation of the Speedy Trial Act is reversed and the cause is remanded to the district court with instructions to dismiss the indictments as to the above-captioned appellants without prejudice in accordance with the opinion filed this day.

By the Court:

Clerk.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1355

UNITED STATES, APPELLEE,

v.

JAMES CRAWFORD MCAFEE,
LLOYD COWAN PARKER,
WILLIAM BULL PRINGLE, III, DEFENDANTS, APPELLANTS

Before
Coffin, *Circuit Judge,*
Timbers,* *Senior Circuit Judge,*
Bownes, *Circuit Judge.*

ORDER OF COURT

Entered: February 27, 1986

Upon consideration of the petitions for rehearing filed by the parties,

It is ordered that both petitions for rehearing be denied.

By the Court:

Clerk.

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* Of the Second Circuit, sitting by designation.

[cc: Messrs. Muse, Ritchie, Moncier and Katzmann]

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20220

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Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1959.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PETITIONER,

v.

JAMES CRAWFORD McAFEE, ET AL.,
RESPONDENTS.

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Whether the Court of Appeals acted properly in refusing to exclude from calculation of the Speedy Trial Act's seventy day time limit, 18 U.S.C. § 3161(c)(1), a period of delay caused by an administrative mix-up which prevented the trial judge from knowing that the case was on his docket.

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CASES.

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STATUTES:

Speedy Trial Act of 1974,	
18 U.S.C. § 3161 et seq.	2
18 U.S.C. § 3161 (c) (1)	1
18 U.S.C. § 3161 (h) (1) (F)	1, 2, 3

No. 85-1959.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PETITIONER,

v.

JAMES CRAWFORD McAFEE, ET AL.,
RESPONDENTS.

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Summary of Argument.

The Court of Appeals determined that a delay of approximately 132 days in bringing defendants to trial was the result of an administrative mix-up which prevented the trial judge from knowing the case had been assigned to him and ruled that it was not excludable from calculation of the Speedy Trial Act's seventy day time limit. 18 U.S.C. § 3161(c)(1). Accordingly, the Speedy Trial Act's pretrial motion exclusion, 18 U.S.C. § 3161(h)(1)(F) and *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), do not apply and do not require a different result.

Argument.

Respondents, by counsel, oppose the Government's Petition for a Writ of Certiorari. The judgment of the Court of Appeals should not be vacated because this Court's decision in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), upon which the government relies, does not apply to this case.

Henderson interpreted § 3161(h)(1)(F) (subsection (F)) of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, to mean that any delay resulting from a pretrial motion, from filing through conclusion of the hearing, would be excludable, regardless of whether the delay was "reasonably necessary." While this Court eliminated the "reasonably necessary" requirement that had been read into subsection (F) by several courts of appeals, including the First Circuit in *United States* v. *Mitchell*, 723 F.2d 1040 (1st Cir. 1983), it did not and could not delete the explicit requirement of the statute that to be excludable the delay must *result* from any pretrial motion. It is clear that the delay in *Henderson* did in fact result from pending pretrial motions. Slip op. 2-4.

In the appeal following remand of this case the First Circuit was concerned with a delay between January 10 and May 23, 1983. It held:

> The primary cause of the delay in this case was the administrative mix-up which prevented the court from exercising proper control of the case, indeed from even knowing that the case was on its docket.

(App. 6a.) The elimination of such delays was a major, if not *the major*, concern of Congress in passing the Act (App. 5a). Once it became aware of the actual reason for the delay the court never treated the delay from January 10 to May 23,

1983, as one "resulting from any pretrial motion," and thus *Henderson* and subsection (F) itself simply do not apply.

In short, the mere coincidence of a pending motion during the period of delay does not alter the facts as determined by the Court of Appeals, that the delay was the result of separate and independent causes which rendered it the kind of delay not excludable under the Act (App. 6a).

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1355

UNITED STATES, APPELLEE,

v.

JAMES CRAWFORD MCAFEE, LLOYD COWAN PARKER,
WILLIAM BULL PRINGLE, III, DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Andrew A. Caffrey, *U.S. District Judge*]

December 20, 1985

Before COFFIN, Chief Judge, and TIMBERS,* Senior Circuit Judge, BOWNES, Circuit Judge

BOWNES, *Circuit Judge*. We consider here an appeal of a decision of the district court arising out of our remand in *United States* v. *Pringle*, 751 F.2d 419 (1st Cir. 1984), in which

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* Of the Second Circuit, sitting by designation.

we asked the district court to determine whether a four and one-half-month period of delay in criminal pretrial proceedings was excludable delay under the Speedy Trial Act, 18 U.S.C. § 316(h)(1)(F) (1982). The district court found the delay excludable and defendants have appealed.

For a complete and detailed description of all of the pretrial proceedings, we refer to our previous opinion, *Pringle*, 751 F.2d at 430-31. Focusing only on the period of delay at issue here, January 10, 1983, to May 23, 1983, we summarize the essential facts. The delay was preceeded by a continuance which postponed the date set for a hearing on dispositive motions and/or trial from November 29, 1982, to January 10, 1983. In the application for the continuance, defense counsel stated that "all defendants in the above-captioned matter waive their rights to a speedy trial." Because the continuance coincided with the implementation of a plan of the District of Massachusetts to expedite the trials of both criminal and civil cases by reassignment of the cases, the district court made the rescheduling of the hearing/trial date for January 10, 1983, subject to the confirmation of the judge to whom the case would be reassigned. The January 10, 1983 hearing/trial date never materialized, however. No further action occurred in the case, other than the government's filing on March 11, 1983, of a memorandum in opposition to the defendant's motion to dismiss and suppress, until the new judge to whom the case had been assigned on December 15, 1982, held a status conference on May 23, 1983.

At the time of the remand, we speculated that two different scenarios might explain this long delay. One was that both the court and government relied upon the waiver by the defendants of their speedy trial rights and did not apply the requirements of the Act to this case. In our previous opinion, we held that while a waiver of this kind could not be permitted to suspend the operation of the Speedy Trial Act, we would not let waiver-

induced delay count toward the seventy nonexcludable days required for dismissal of an indictment, 18 U.S.C. §§ 3161(c)(1), 3162(a)(2), because this was the first time this rule was announced. We reasoned that we should not allow defendants to lull "the court and the prosecution into a false sense of security only to turn around later and used the waiver-induced leisurely pace of the case as grounds for dismissal." *Pringle*, 751 F.2d at 434. Thus, we directed on remand that if the delay was caused by the waiver, it should be treated as excludable.

There was, however, a second explanation for the delay, which would not result in its exclusion. A major discovery issue in the case at that time was whether the government would release classified information pertaining to how the defendants' yacht had been spotted and put under surveillance. While the government did not actually move for a protective order for the classified information requested by defendants until June of 1983, it had indicated to defendants that it would proceed under the Classified Information Procedures Act as early as January, 1983. Since the motion for suppression and dismissal may have rested upon this classified information, it appeared that the government's long delay in addressing this crucial issue might have been the cause of the delay. We stated in our previous opinion that if the government's procrastination was at the root of this delay, the court also would bear some responsibility for failing to move the case along. Thus, we concluded that "[i]f the delay between January 10, 1983, and May 23, 1983, was due to the government and the court, not the defendants' waiver, then the time is nonexcludable and the indictment must be dismissed." *Pringle*, 751 F.2d at 435.

Upon remand, the district court below held an evidentiary hearing to determine whether the defendants' waiver "caused or contributed to the delay." *Pringle*, 751 F.2d at 434. The district court found that the government attorney had in fact

relied upon the defendants' waiver and had accordingly slowed down the pace of the case. The effect of the waiver was further strengthened by numerous conversations between the government and defense counsel in which defense counsel indicated their satisfaction with the slow pace of the case because they were all extremely busy and because they recognized that the case was a "loser" and that their clients faced "maximum exposure." The district court found that the "defendants' waiver was the substantial, predominant, and proximate cause of the leisurely pace at which the case proceeded."

During the remand hearing, however, a third explanation for the period of delay surfaced. A transcript of the May 23, 1983, status conference which had not previously been available either to this court or the parties showed that the district court itself was unaware that the case had been reassigned to it until shortly before the status conference:

> THE COURT: Where has this case been since the 15th of December when I discovered to my horror this was allegedly withdrawn. I never saw or heard of this case until last Wednesday or Thursday.
>
> MR. ELDRIDGE: Is that right, sir?
>
> THE COURT: You better believe it. My regular courtroom deputy is in Paris at the moment so I can't interview her as to what, if anything, she knows or doesn't know. I never saw the names of any of these defendants. We get a computerized printout every week or couple times a week.
>
> MR. MONCIER: Judge Garrity had the case.
>
> THE COURT: Up until December 5th.
>
> MR. MONCIER: Then it went into what we understand was a pool and we were just informed that your Honor had been assigned the case out of the pool.

> THE COURT: Well, what they did is all the cases that the panel headed by Judge Garrity didn't dispose of were redrawn on one individual member of the Court and the computerized docket, which is this thick, recites it was drawn to me December 15th, but never got on any of my individual lists.

It thus appears that even though the government may have been relying upon the waiver to justify its slow movement on the case, the court itself was, due to a clerical or computer error, entirely unaware of the fact that the case was on its docket and, therefore, could not have known of the waiver.

In holding that the delay in question was predominantly caused by the waiver, the district court focused upon the government's role of helping the court to stay within the limits of the Speedy Trial Act problems which were being created by the long delay. The difficulty we have with this analysis is that it fails to recognize that the court has its own independent responsibility to enforce the Act.

While the government's interest in avoiding the dismissal of indictments may motivate it to remind the court of possible Speedy Trial Act violations lurking ahead, the primary responsibility for meeting the Act's requirements rests on the court. The elimination of delays caused by court congestion and administrative red tape was a major, if not *the* major, concern of Congress in passing the Act. S. Rep. No. 1021, 93d Cong., 2d Sess. 22, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 160 (Fed. Judicial Center 1980). It is the court which must set the dates for hearings and trial and decide pretrial motions within the time limits specified by the Act. "Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself." *Pringle*, 751 F.2d at 429. A breakdown in the administrative processing of a case cannot be excused be-

cause of a waiver-induced failure of the government to monitor the progress of the case. It is the court's responsibility to see to it that the deadlines of the Act are met. The primary cause of the delay in this case was the administrative mixup which prevented the court from exercising proper control of the case, indeed from even knowing that the case was on its docket. We are sensitive to the fact that in this case the judge personally was fully aware of his responsibilities and acted promptly when he discovered the error. Our difficulty, however, with attributing significance to possible error or inaction by the prosecutor of a court clerk is that such an analysis fails to recognize that the court has its own independent and undelegable responsibility to enforce the Act.

A delay of this kind is not excludable time under the Act. *United States* v. *Ferris*, 451 F.2d 436 (1st Cir. 1984). When this four and one-half-month delay is added to the sixty-two days of nonexcludable delay which occurred during other parts of the pretrial period, the total far exceeds the seventy days of pretrial delay allowed under the Act. Dismissal of the indictment is, therefore, mandated. 18 U.S.C. § 3162(a)(2).[1]. The facts and circumstances of this case lead us to conclude that the dismissal should be without prejudice. Defense counsel are not blameless here. Although the waiver was not the primary cause of delay, the government might have alerted the judge to the progress of the case had it not relied on the waiver.

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[1] 18 U.S.C. § 3162(a)(2) provides in pertinent part:

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. . . . In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution of the administration of this chapter and on the administration of justice.

We do not think defendants should benefit from the misrepresentations of their counsel by a dismissal with prejudice.

Reversed. Dismissed without prejudice.